



U.S. Citizenship
and Immigration
Services

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FILE:

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Office: NEBRASKA SERVICE CENTER

Date: JUN 12 2006

IN RE:

Petitioner:

Beneficiary:

PETITION:

Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

A handwritten signature in black ink that appears to read "Mai Johnson" or "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was a post-doctoral researcher at the Center for Excellence in Forging Technology at the Ohio State University (OSU). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now Citizenship and Immigration Services (CIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien’s past record justifies projections of future benefit to the national interest. The petitioner’s subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term “prospective” is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Counsel contends that the petitioner is “one of the leading scientists in the field of sheet metal forming, tribology in metal forming, automatic control, computer aided design and computer aided engineering.” Counsel states:

[The petitioner] is an extraordinary research scientist who has made significant and substantial contributions to the research on lightweight materials for manufacturing applications. . . .

Currently, [the petitioner] is employed as a Post-doctoral Researcher of the Center for Excellence in Forging Technology at the Ohio State University, headed by Dr. [REDACTED]

[REDACTED]
Given that his cutting-edge research has significant implications not only [for] the economy but also for the environment, [the petitioner’s] continued presence in the United States is vital to the success of his current work that will ultimately benefit the whole nation. Prior to his working at the Center for Excellence in Forging Technology, [the petitioner] served as a visiting scholar at the Engineering Research Center at the Ohio State University. His cutting-edge contributions to metal forming research at the Engineering Research Center at the Ohio State University, as indicated by his proven track record of extraordinary research accomplishments reflected in his prestigious publications and presentations at national and international forums, should merit his exemption from the labor certification requirement.

The petitioner submits copies of published and unpublished scholarly writings, along with six witness letters. Three of the letters (attributed to [REDACTED] of [REDACTED] Professor [REDACTED] of OSU; and Professor [REDACTED] of OSU) contain identical, grammatically anomalous passages such as “the success of this project will bring a revolution to forging industry and greatly enhance the competitiveness of U.S. forging industry” and “lubrication plays key role.” Each letter contains the same misspelling of “[REDACTED] in the phrase “Sikorvski Aircraft Company, which is the producer of black hawk.” While we shall take into account, in a general sense, the endorsements of Mr. [REDACTED] Prof. [REDACTED] and Prof. [REDACTED] we cannot consider the exact wording of these letters to have any significant evidentiary weight. The letters were not written by these witnesses, but rather by a third party for the witnesses to sign.

Dr. [REDACTED] technology manager for Supporting Industries at the U.S. Department of Energy, states:

I am pleased to acknowledge that [the petitioner] is the coordinator for the lubrication research on the Department of Energy-Industrial Technologies Program (DOE-ITP) sponsored project . . . at the Ohio State University, Columbus, Ohio.

From the DOE-ITP point of view, granting the said petition would be in public interest, since the project [the petitioner] is working on can be regarded as significantly important in serving to enhance the energy competitiveness of the U.S. industry, and contributing to meet the energy and environmental goals of the DOE Supporting Industries of the Future focus area. The project investigates innovative die material and lubrication strategies for cleaning and energy conserving forging technologies which will work towards improving competitiveness and working environment of the U.S. metal forming industry, and could save the U.S. metal forming industry as much as billions of dollars annually.

The remaining two letters discuss the petitioner’s work in greater detail. Dr. [REDACTED], manager of Die Engineering Analysis for the Metal Fabricating Division of General Motors,¹ states:

Because of my involvement in the USAMP-AMD Project, “**Active Flexible Binder Control System for Robust Stamping**,” in which [the petitioner] has been the major researcher for the Project from May 2001 to October 2002; I know very well of [the petitioner’s] research competencies and contributions.

USAMP is the abbreviation for “United States Automotive Materials Partnership.” The objective of the project “USAMP-AMD” is to enhance US automotive industry’s competitiveness by improving automotive fuel economy through the use of lightweight sheet materials, such as aluminum alloy and magnesium alloy. The flexible binder control system technology developed by [the petitioner’s] research group is one of the several technologies in manufacturing automotive stampings using these lightweight materials. . . .

¹ Dr. [REDACTED] repeatedly refers to his employer, General Motors, as “General Motor Corp.” or “General Motor Company.”

[The petitioner] has an excellent background in metal forming, computer-based stamping simulation and adaptive control theory. In our Project of flexible binder control system, he developed a so-called adaptive control strategy, which can predict an optimal binder force trajectory within a minimum amount of computation time. The algorithm has been successfully implemented to improve our stamping processes. . . . In [the petitioner's] innovation, the deformation of blank that causes splits, wrinkles and springback is continuously monitored and mitigated by continuously adjusting the blank holder force, thus it is possible to form a part without splits, wrinkles and springback. . . .

In summary, [the petitioner] is one of the most valuable researchers and scientists in the fields of sheet metal forming process and dies, and advanced stamping simulations and controls.

Dr. [REDACTED] president of [REDACTED] ., states:

The purpose of the Computer Aided Engineering Global Service Feasibility Study utilizing computer aided engineering design is to investigate the possibility of creating a virtual company for industry, especially for the automobile industry, through the internet. In this proposed company, different partners, that can be located in any place in the world, are connected by the internet. Since the partner is chosen by considering the cost and capabilities of the partner in the concerned area, the performance of the virtual company can be optimized. . . .

Due to [the petitioner's] outstanding research capabilities and special academic background . . . , in November, 2002, he was invited by the Center for Excellence in Forging Technology headed by Dr. [REDACTED] at Ohio State University to coordinate two projects, one is a four million dollar project "Innovative Die Material and Lubrication Strategies for Clean and Energy Conserving Forging Technology" (sponsored by the Department of Energy), and the other is a one million dollar project "Flexible Forging Machine Design" (sponsored by the Defense Department). . . .

The improper use of lubricant is a major source of environmental pollution by forging plants. The project "Lubrication Spray Process Optimum Control" aims to minimize the amount of the lubricant spray by optimal control lubricant spray process. . . .

The purpose of the project "Flexible Forging Machine" is to shorten the lead time in the development of forging parts by designing a so-called "Flexible Forging Machine," which can automatically adjust the die cavity according to the part geometry. Since no new die needs to be manufactured, a lot of lead time and expensive die materials can be saved through this strategy. For example, a part in the rotator of a military helicopter . . . takes 2.5 years to be manufactured by conventional forging processes. The success of the Flexible Forging Machine would shorten this forging process to half a year.

On June 1, 2005, the director issued a request for evidence (RFE). Among other things, the director instructed the petitioner to submit documentation to establish his claimed leadership role in research projects, and to provide evidence that other researchers have cited his work. The director stated that the petitioner “must establish . . . a past record of specific prior achievement that justifies projections of future benefit to the national interest.”

In response, counsel states that the petitioner’s “achievements at this point are having an impact far beyond what most researchers can even expect in their lifetime.” Counsel also states: “One of his projects in China has already evolved into U.S. commercial software called ‘NX Progressive Die Wizard’ in Uni-Graphics, which is currently being used in industries worldwide.” In a new letter, Dr. [REDACTED] manager of the Mold/Die Development Team at UGS, states:

UGS manages or creates more than 40 percent of the world’s 3-Dimensional data, with products including NX, SolidEdge, Ideas and Nastran etc. . . . Our Mold & Die Tooling Department develops software packages for Mold and Die Design. NX Progressive Die Wizard, which provides efficient and effective design solutions to progressive die manufacturers, is one of our major products. . . .

The State Key Laboratory of Plastic Forming Simulation and Die & Mold Technology at Huazhong University of Science & Technology (HUST) is the best research unit in China, and is the most active in the world when it comes to developing computer aided design systems for a progressive die system. UGS has collaborated with HUST since 1998, when [the petitioner] was working on the progressive die CAD system development project at HUST. During that time, [the petitioner] proposed a revolutionary feature mapping approach [that] was the basis for a mainstay computer aided design concept in the progressive die industry. . . .

From 1998 to 2000, [the petitioner] was working on the die structure design module and proposed a feature mapping approach to efficiently generate progressive die structure.

His approach was initially applied in the multiple intelligent agent progressive die computer aided design system, and later evolved into the feature extracting and mapping functions of developing process design in our current product, “NX progressive die wizard.” This has subsequently become the most popular progressive die design software in the US and around the world.

We note that Dr. [REDACTED] does not state that the petitioner developed NX Progressive Die Wizard; rather, the petitioner developed an approach that was later incorporated into one component of NX Progressive Die Wizard.

In a new letter, Prof. [REDACTED] describes the sheet metal drawing process in greater detail and explains the petitioner’s work in that area:

A typical sheet metal drawing process is composed of three steps, 1) blank holder moves down to clamp the blank; 2) punch moves down to form the sheet; 3) remove the tooling and take out the part. The blank holder plays a key role in the drawing process by suppressing the wrinkling failure. A well-designed blank holder force trajectory can improve the formability of sheet materials. In the process of predicting blank holder force, the early reporting of wrinkling which happens at both cup wall and flange areas is critical. Before [the petitioner], wrinkling management was only conducted on the part flange area, which was limited to the drawing of simple geometry. [The petitioner] developed a geometrical-based sidewall wrinkling measuring method and successfully predicted a variable blank holder force to improve drawability of a challenging conical geometry around 10%.

Prof. [REDACTED] also describes subsequent projects that the petitioner did not begin until after the petition's August 27, 2003 filing date. These projects cannot establish eligibility as of the filing date, but they do serve to establish the petitioner's continued involvement in the field.

Regarding the petitioner's claimed leadership role in previously mentioned research projects, counsel refers to previously submitted witness letters. The petitioner does not provide the supporting documentary evidence that the director had specifically requested. A new letter refers to the petitioner as "the principal investigator" in a new project that began after the petition's filing date.

Regarding the petitioner's published work, counsel asserts that the director failed to take into account the petitioner's publication of "19 articles in journals **prior to the time of initial filing**" and asserts that the petitioner's "research has been cited 16 times thus far." The initial submission did not include copies of 19 articles or first-hand evidence of their publication. Rather, it included an unpublished manuscript and two published articles based on conference presentations. Even the petitioner's own *curriculum vitae*, submitted with the petition, lists only ten articles. Given these submissions, the director clearly had no reason to conclude that the petitioner had published 19 articles before the filing date.

The petitioner submits copies of several published articles, all of them in Chinese, written by the petitioner or containing citations of the petitioner's published work. The petitioner documents roughly half of the 16 citations claimed by counsel. For reasons unexplained, the petitioner submits three copies of the abstract for "Research on the Open CAD System for Progressive Die Structure."

Counsel asserts that the petitioner's "work has had a remarkable degree of influence in industries across the world, and particularly in the United States." Counsel also states: "The fact that his work has received national-level awards in China and was the basis for the most popular software in the die industry also attracts other scientists to his research." Counsel claims: "in 2004 there were 250 projects which passed the initial strict recommendation criteria by the peer experts [for the Chinese Science and Technology Award]. Only 102 of these were eventually granted awards." Leaving aside the lack of corroboration for these figures, it is not clear that an award that goes to 41% of the nominees is highly exclusive or indicative of rare or lasting influence. Pursuant to 8 C.F.R. § 204.5(k)(3)(ii)(F), recognition from government bodies (such as these awards) can form part, but not all, of a claim of exceptional ability. Exceptional ability, in turn, is not sufficient to secure a waiver.

The director denied the petition, noting that much of the evidence submitted in response to the RFE concerned work that the petitioner did not begin to do until after the petition's filing date. The director explained that, pursuant to *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971), the petitioner must have been eligible at the time of filing.

The director also stated that the record does not support numerous claims in the record, such as counsel's broad claim that the petitioner has had "an impact far beyond what most researchers can even expect in their lifetime," or the claim that the petitioner was leader of several projects prior to the filing date. The director also noted that the credibility of three witness letters was somewhat compromised by strong evidence of common authorship.

The director listed the petitioner's submissions, and asserted "no scholarly publications that cite the petitioner's work were found in the record." The director appears to have mistaken some Chinese articles citing the petitioner's work for articles by the petitioner. The director also indicated that the petitioner had published no journal articles in English prior to the filing date, and stated that the petitioner's Chinese-language articles are not "accessible to . . . the international scientific community." The director did not explain why a history of English-language publications should be a prerequisite for the waiver. A firmly documented history of significant achievement and impact within China would likely prove a highly favorable factor. As it is, the petitioner has documented a moderate citation history within China.

On appeal, counsel justifies the assertion that the petitioner has had "an impact far beyond what most researchers can even expect in their lifetime" by stating that the petitioner "was the original developer of" NX Progressive Die Wizard. Counsel asserts: "It is extremely rare for a research scientist's work to become an industry standard that is used worldwide. In [the petitioner's] case, he can count it as one of his earliest achievements." The record indicates that the petitioner is one of several people who contributed to this program, but there is no evidence that the petitioner was "the original developer" of the program. The petitioner, on his own previously submitted *curriculum vitae*, claimed only to have "[w]orked on the development" of the system. With each successive submission, counsel appears to have further inflated the petitioner's input to the project.

Regarding the identical passages in several witness letters, counsel states that individuals with little practice writing such letters often rely on templates, which each author then customizes with his or her own personal input. We agree with counsel that the use of identical language is not an "inconsistency" as such. **Nevertheless, given the multiple errors in each letter, we see little reason to presume that the witnesses carefully read these letters before signing them.** One of the witnesses, Prof. [REDACTED] asserts "I approve the contents of [the previous] letter" bearing his signature. Prof. [REDACTED] brief new letter contains no new substantive information. Prof. [REDACTED] states "I based my letter on a summary of [the petitioner's] achievements," but the common portions of the letter do not consist merely of factual assertions. The "template" clearly included statements of speculation and opinion, such as the assertion that one of the petitioner's projects "will bring a revolution to [the] forging industry."

Several new exhibits accompany the appeal, but only one new exhibit concerns events relating to the petitioner that transpired prior to the filing date. [REDACTED] a product engineer with Ghabbour Egypt Company, Cairo, Egypt, states that he was a master's degree student when he encountered the petitioner's work:

Among all of HUST's works, [the petitioner's] is very unique and very close to the topic I chose. I therefore found [the petitioner's] webpage . . . in March 2001, and I asked for his papers and dissertation. . . .

Based on [the petitioner's] function oriented assembly design concept, we developed a knowledge-based blanking die design computer aided design system. Several approaches such as the knowledge-based sheet metal feature mapping approach, part positioning tool, assembly tree description of the die system, segmental design of blanking die, and automatic positioning were introduced in [the petitioner's] papers and are discussed in our thesis.

Most of the other new exhibits on appeal concern a new job offer that the petitioner accepted in August 2005. Counsel states:

[The petitioner] received an offer of employment with an annual base salary of \$93,000 from ISATEC of Ohio, a tooling design and manufacturing operation which is a division of Com-Corp Industries. ISATEC supplies automobile parts such as light bulb shields to leading American automobile manufacturers such as General Motors and Ford. The company has also recently been investing in CAD/CAM software for progressive die designers in order to keep ahead of overseas competition.

For ISATEC to have extended such a lucrative job offer to [the petitioner] is yet again proof of his value to U.S. industry and the national interest.

[REDACTED] owner of Isatec of Ohio, confirms that the company "has recently hired" the petitioner to work on "an automatic bulb shield which is installed in headlamps." Separate documentation confirms the terms of employment. We are not persuaded that a job offer from a U.S. employer is persuasive evidence that CIS should not require a job offer from a U.S. employer. Also, this job offer did not exist at the time of filing. For reasons already explained, the terms of a 2005 job offer cannot show that a petition filed in 2003 should have been approved at the time of filing. Counsel does not explain how the new Isatec offer is relevant to the petition as it was first filed, except insofar as it demonstrates that the petitioner remains active in the area of sheet metal engineering, and is no longer at OSU doing the work that formed the original basis for the waiver request.

Counsel is correct that the director did not give full consideration to evidence of the petitioner's impact on his field (such as citation of his published work). Nevertheless, the evidence does not support counsel's exaggerated estimation of that impact. For instance, time and again counsel emphasizes that the petitioner's work has been the subject of a U.S. patent application, as though the filing of such an application is, itself, a rarefied privilege rather than a more or less routine element of industrial innovation. Binding precedent already addresses this issue:

“innovation is not always sufficient to meet the national interest threshold. For example, an alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent.” *Matter of New York State Dept. of Transportation* at 221, n.7.

The record does show, to some extent, that other engineers have availed themselves of the fruits of the petitioner’s work; but this is to be expected from any useful engineering research that is intended to have industrial applications. We cannot hold that the only engineers who are subject to labor certification are those whose work yields no useful results. The petitioner must show not only that his work has practical applications (he would be a poor engineer indeed if it had none); he must also show that the extent of his impact substantially exceeds that of others within the specialty. The anecdotal assertions in the record are not sufficient to make such a showing. Because the petitioner works in an area with real-life industrial applications, witnesses’ pre-written claims that the petitioner’s work will spark a “revolution” cannot carry the same weight as actual documentary evidence that the petitioner’s work has actually been implemented at a major industrial level and has, in fact, resulted in major cost savings or improvements in manufacturing.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee. We note that, in May 2006, an employer filed a new immigrant petition on behalf of the alien involved in this proceeding. The new petition, still pending as of the date of this adjudication, seeks a classification that requires an approved labor certification. Thus, it appears that the employer was able to obtain a labor certification for the alien.

ORDER: The appeal is dismissed.